No. 405.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE NORTH BLOOMFIELD GRAVEL MINING COMPANY, A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE.

SAMUEL KNIGHT,
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*Filed*_____ *1898.*

_____ *Clerk.*

*By*_____ *Deputy Clerk.*

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STATEMENT OF THE CASE.

This in an action in equity brought in the court below by appellee, the United States, to restrain appellant, The North Bloomfield Gravel Mining Company (a corporation), from mining on the headwaters of the Yuba river by the hydraulic process until it shall have complied with the provisions of the act of March 1, 1893 (27 U. S. Stats. at Large, 507), commonly called the "Caminetti Act," hereinafter referred to. As appellant's counsel in his brief fails to observe the same care in setting forth the bill that he observed in stating the answer, the Court's

attention is respectfully directed in this regard to the transcript of record (pp. 1-9).

It may be here further observed, in passing, that although a demurrer, exceptions, and motion to strike out were originally interposed to the answer, and are printed in the transcript, as stated by appellant's counsel (Brief, p. 8), it was subsequently agreed between the parties that this form of objection to the answer should be considered withdrawn, and the case submitted to the Court below upon bill and answer only, in accordance with equity practice,

Grether et al. v. *Wright et al.*, 75 *Fed.* Rep. 742;

and it was so understood by the Circuit Court in rendering its opinion.

United States v. *North Bloomfield Gravel Min. Co.*, 81 Fed. Rep. 243, 244, 247.

POINTS AND AUTHORITIES.

Briefly stated, appellant practically contends here, as it did in the Court below:

(1.) *That under the provisions of the act in question the mining company has the option whether or not to submit to the jurisdiction of the California Debris Commissioner, created by that act, and obtain the permit to mine by the hydraulic process there provided for; otherwise the act is unconstitutional.*

(2.) *That where the impairment by appellant, actual or threatened, of the navigability of the public streams admittedly used by it is not judicially susceptible of proof, an action for an injunction will not lie to restrain it from carrying on its hydraulic mining and the consequent use of these streams. In other words, in the case at bar the government is remediless.*

While appellant ostensibly disclaims any attack upon the constitutionality of the act under which the bill in equity in this case was brought, for the obvious reason that such act was passed partly in aid of the hydraulic miners in the State of California, and relieves them as far as possible and consistent with the rights of others from the unfortunate situation in which they were placed, because of the injurious character of their business upon the property and rights of others situated farther down the streams—in other words, because of the miners' apparent inability to observe the axiom, "Sic utere tuo ut non alienum laedas,"—nevertheless it covertly attempts to accomplish the same purpose by contending for a forced and unnatural interpretation of the language of section 9 of the act, which, it is submitted, is wholly at variance with and does violence to its obvious meaning, and is inconsistent with its phraseology and the intention of Congress in enacting it. To use the counsel's own language in stating his position in this respect it is averred (Brief, p. 21):

> "We do not contend, nor have we contended, that the act is unconstitutional, but we do insist

that the construction contended for by complainant's counsel would render the act both unconstitutional and against natural right."

And again he says (Brief, p. 59):

"If the contention, however, of complainant's counsel is correct, that the present act is mandatory in its requirements upon hydraulic miners, then it is certain that Congress has made an unconstitutional invasion upon the right of this State to regulate its own affairs, and has even gone further than the State itself could go under its own constitution. * * * " (Brief, p. 60.) "If this section is mandatory, it is thoroughly unconstitutional."

I.

A Statute is to be Construed to Effect the Purpose Intended.

It is a cardinal rule of construction that the purpose of the legislature and the objects aimed at are to be considered, and if the language used is susceptible of more than one construction, it is to receive that which will effectuate such object and purpose rather than tend to defeat it.

"It is the spirit and purpose of a statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be so construed as to carry out the legislative in-

tent, even although such construction is contrary to the literal meaning of some provisions of the statute."

People v. *Lacombe*, 99 N. Y. 43.

"It is a cardinal rule of construction that a statute must be construed with reference to the objects intended to be accomplished by it."

People v. *Dana*, 22 Cal. 11.
See also *Sherman* v. *Buick*, 32 Cal. 241.
Helm v. *Chapman*, 66 Cal. 291.

"In the construction of a statute, the intention of the legislature must govern, and this must be ascertained not from a particular section, but from the whole statute."

Smith v. *Randall*, 6 Cal. 48.

It was said by Mr. Chief Justice Fuller:

"Nothing is better settled that that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Law Ow Bew v. *United States*, 144 U. S. 59.

Said Mr. Justice Brewer:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to rem-

edy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the intention of the legislative body."

Holy Trinity Church v. *United States*, 143 U. S. 463.

Said Mr. Justice Davis:

"In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress and this is to be ascertained from the language used. But Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of the particular provisions in it."

United States v. *Union Pacific R. R. Co.*, 91 U. S. 79.

Cases to this effect might be cited without number, including several recent federal decisions rendered in this Circuit; but this seems hardly necessary.

II.

History of the Times.

In order to assist us in arriving at a proper construction of the act under consideration, let us glance for a moment at the history of the times when this measure was passed and the conditions under which Congress thus acted. It is best stated in the language of the learned Circuit Judge who delivered the opinion in the Court below (81 Fed. Rep. at pp. 248, 249):

> "Long-continued mining by this (the hydraulic mining) process, in the territory drained by the rivers mentioned (in the bill), had resulted in depositing in them and upon much of the adjacent land vast quantities of debris, thereby, to a great extent, impeding the navigation of the waters, and rendering valueless large quantities of otherwise fertile lands. This unfortunate condition of affairs necessarily gave rise to many and bitter contests in the courts between the conflicting interests. Some of the suits were brought in this court and many of them in the courts of the State, resulting, ultimately, wherever it was shown that such hydraulic mining was causing injury to the public streams or waters, or to others' lands, in perpetually enjoining such mining. One of such suits was brought against the present defendant in this court to en-

join it from working by the hydraulic process the same mining ground it is now operating. That suit resulted in a decree enjoining the defendant from so working its mining ground; but the decree contained a provision to the effect that if, in the future, the defendant corporation should show to the Court that it had constructed impounding reservoirs which would successfully impound its mining debris, the decree might be modified so as to permit the operation of the mine. That case was tried and decided by Judge Sawyer, and is reported in 18 Fed. Rep. 753, under the title of Woodruff v. Mining Co. Some time after the making of the decree the defendant established a system of impounding works, and commenced again its mining operations. That action on the part of the defendant resulted in a suit brought in this court by the United States against the defendant, to obtain an injunction prohibiting it from continuing its hydraulic mining operations. After a trial of that case, in which much testimony was introduced (53 Fed. Rep. 625), this Court (Judge Gilbert presiding) found that by the construction and use of its impounding works the defendant prevented the escape of any debris from its mine into the navigable waters of the rivers mentioned that would tend to impair or injure their navigability, and therefore denied the injunction prayed for. In neither of

these decisions was mining by the hydraulic process regarded, in and of itself, as unlawful. That it is not unlawful, but highly useful and commendable when properly conducted, and without injury to the property or rights of others, hardly needs judicial decision. In

Yuba Co. v. *Cloke*, 79 Cal. 239, 243, 21 Pac. Rep. 740, 741,

the Supreme Court of California said:

'It seems to us it must be conceded that the business of hydraulic mining is not within itself unlawful or necessarily injurious to others. The unlawful nature of the business results from the manner in which it is carried on, and the neglect of parties engaged therein to properly care for the debris resulting therefrom, whereby it is allowed to follow the stream, and eventually cause injury to property situated below.'

"Nobody wanted gold mining by the hydraulic process stopped so long as it could be prosecuted without injury to the navigable waters, or to the property or rights of others. And so an effort was made by the parties most directly interested—the miners and agriculturists—to induce Congress to legislate upon the subject, which effort resulted in the passage of the act of March 1, 1893."

It is thus apparent that this measure was intended for the benefit of both the farmer and the miner. The farmer

was to be protected by having hydraulic mining absolutely prohibited in the territory mentioned in the act, except under the supervision of a body of skilled experts, the Debris Commission; and the miner was to be protected in having a proper and scientific determination made as to whether, and if so under what conditions and circumstances, he could mine with safety.

The act is entitled "An Act to create the California Debris Commission and regulate hydraulic mining in the State of California"; and in setting forth its scope and character we are further tempted, for clearness of expression, to again quote from the opinion of the learned Circuit Judge, first calling the Court's attention especially to sections 3, 9, and 10 of the act, providing as follows:

> "Sec. 3. That the jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California. Hydraulic mining, as defined in section eight hereof, directly or indirectly injuring the navigability of said river systems, carried on in said territory other than as permitted under the provisions of this act, is hereby prohibited and declared unlawful.
>
> * * * * * * * * *

"Sec. 9. That the individual proprietor or proprietors, or, in case of a corporation, its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply wth law and the rules prescribed by said commission.

"Sec. 10. That said petition shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said State, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said State; *provided*, that they shall not interfere with the navigability of the aforesaid rivers."

Said the Court below (pp. 249-251):

"As enacted, after creating the California Debris Commission, and providing for the appointment of its members, and for the filling of vacancies occurring therein, and for the exercise of the powers conferred upon it, under the direction of the secretary of war and the supervision of the chief of engineers, and authorizing the commission to adopt rules and regulations not inconsistent with law, to govern its deliberations and procedure, the act declared the jurisdiction of the commission, in so far as the same affects mining carried on by the hydraulic process, to extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California. It declared for the purposes of the act, 'hydraulic mining' and 'mining by the hydraulic process' to have the meaning and application given to those terms in the State of California. That meaning is sufficiently set out in the bill in the present case. The act prohibited and declared unlawful such hydraulic mining 'directly or indirectly injuring the navigability of said river systems, carried on in said territory, other than as permitted under' its provisions. (Sections 3, 22.) But this was by no means the extent of the act or of its prohibition. Its very purpose was to provide a means by which such mining could be carried on in the territory named without injuring the

navigability of the said river systems, directly or indirectly. Recognizing the great damage that had been done to the navigable waters mentioned by hydraulic mining in the past, it created a commission of skilled officers to exercise the powers conferred upon it under the direction of the secretary of war and the supervision of the chief of engineers of the army, and by section 4 of the act made it the duty of the commission to mature and adopt, from examinations and surveys already made, and from such additional examinations and surveys as the commission should deem necessary, such plan or plans

'As will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from debris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said state, to be carried on, provided the same can be accomplished without injury to the navigability of said rivers or the lands adjacent thereto.'

"By section 5 of the act it is made the duty of the commission to—

'Further examine, survey, and determine the utility and practicability, for the purposes herein-

after indicated, of storage sites in the tributaries of said rivers and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for the storage of debris or water or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers by preventing deposits therein of debris resulting from mining operations, natural erosion, or other causes, or for affording relief thereto in flood times, and providing sufficient water to maintain scouring force therein in the summer season; and in connection therewith to investigate such hydraulic and other mines as are now or may have been worked by methods intended to restrain the debris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid.'

"Sections 9 and 10 of the act are as follows:

* * * * * * * * *

"Subsequent sections provide for a joint petition by the owners of several mining claims so situated

as to require a common dumping ground or restraining works, and for proceedings of the commission thereon, including the provision contained in section 14, that upon the completion of such works as may be authorized and required by order of the commission—

'If found in every respect to meet the requirements of the said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act.'

"Section 15 is as follows:

'Sec. 15. That no permission granted to a mine owner or owners under this act shall take effect, so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission have been completed, and until the impounding dams, or other restraining works, or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same; provided, however that if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said

systems and the work of said commission, then the owners or owners of such mine or mines may be permitted to commence operations.'

"And by section 17 it is declared:

'That at no time shall any more debris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers and the respective branches of each, worked under the provisions of this act than can be impounded within the restraining works erected.'"

There is therefore presented in this act a complete, comprehensive scheme, whereby hydraulic mining is the territory drained by the Sacramento and San Joaquin river systems may, under certain conditions and limitations, be prosecuted, otherwise prohibited.

III.

The Act of March 1, 1893, is Within the Commercial Powers of Congress.

See *Section 8 of Article I of the Constitution of the United States*, and decisions hereinafter referred to.

(1.) *Congress under its commercial powers, can control the navigable waters of the Sacramento river system and tributary streams, though situated entirely within the boundaries of the State of California, as the ocean is their outlet.*

§ *Am. and Eng. Ency. of Law*, vol. 3, page 702, and note,

"The (commercial) power of Congress is restricted to such waters as can be employed in commerce between a State and foreign nations, or some other State. * * * "

River and Harbor Act of September 19, 1890, (hereinafter referred to).

Gilman v. *Philadelphia*, 3 Wallace, 713.

The Daniel Ball v. *United States*, 10 Wallace, 557.

Cardwell v. *American River Bridge Co.*, 113 U. S. 205.

Escanaba & Michigan Transportation Co. v. *Chicago*, 107 U. S. 678.

(2.) *This control by Congress over the navigable waters of the United States is absolute, and, in its exercise, Congress can arbitrarily determine what is and what is not an injury to such waters, or an obstruction to commerce upon them.*

Said the Supreme Court of the United States in *South Carolina* v. *Georgia*, 93 U. S. 4:

"That the power to regulate interstate commerce and commerce with foreign nations, conferred upon Congress by the constitution, extends to the control of navigable rivers between States, rivers that are accessible from other States, at least to

the extent of improving their navigability, has not been questioned during the argument, nor could it be with any show of reason."

We may here remark, parenthetically, that the rivers used by the appellant company to carry off some of its debris, as admitted in the answer, are the objects of improvement by the complainant.

See the *River and Harbor Acts of 1890 for 1894 and 1896*, hereinafter referred to.

The Court said further:

"The power to regulate commerce, conferred by the constitution upon Congress, is that which previously existed in the States. As was said in *Gilman* v. *Philadelphia*, 3 Wall. 724:

'Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and, to the extent necessary, of all the navigable rivers of the United States which are accessible from a State other than that in which they lie. For this purpose *they are the public property of the nation* [the italics throughout are ours], and subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstructions to their navigation interposed by the State or otherwise; to remove such obstructions where they exist; and to provide, by such sanc-

tions as they may deem proper against the occurrences of the evil, and for the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the National constitution, and which have always existed in the Parliament of England.' Such has uniformly been the construction given in that clause of the constitution which confers upon Congress the power to regulate commerce.

(3). *The exercise of this power by Congress, through its duly appointed agents, is not the subject of judicial investigation.*

Miller v. *Mayor etc. of New York*, 109 U. S. 385.

In this case an act of Congress made the approval of the plans of the New York and Brooklyn bridge, and the consequent lawfulness of that structure, depend upon the determination of the secretary of war as to

> "Whether the bridge, when built, would conform to the prescribed conditions of the act 'not to obstruct, impair, or injuriously modify the navigation of the (East) river.' * * * * But, until the secretary approved the plan and location and notified the company of the same in writing, the bridge should not be built or commenced."

So, here, the question of the effect of proposed hydraulic mining upon certain streams is left by Congress to the determination and judgment of a board of experts, the

California Debris Commission. Until they signify their approval by granting a permit to so mine, this industry, as far as it uses these streams, is inhibited by the act of Congress under consideration. Although in the New York case the complainant alleged injury, while, in the case at bar, the appellant denies it, the principle is the same and the rules of law enunciated in the former case are, we respectfully submit, equally applicable to the latter.

Said the Supreme Court:

> "The erection of the bridge at the elevation proposed was authorized by the action of both the State and federal governments. It would, therefore, when completed, be a lawful structure. If, as now completed, it obstructs in any respect the navigation of the river, it does so merely to an extent *permitted by the only authorities which could act upon the subject.* And the injury, then apprehended and alleged by the plaintiff and now sustained, is only such as is common to all persons engaged in commerce on the river and doing business on its banks, and therefore, *not the subject of judicial cognizance.* * * * *
>
> "It is contended by the plaintiff, with much earnestness, that the approval by the secretary of war of the plan and location of the bridge was not conclusive as to its character and effect upon the navigation of the river, and that it was still open to

him to show that, if constructed as proposed, it would be an obstruction to such navigation, as fully as though such approval had not been had. It is argued that Congress could not give any such effect to the action of the secretary, it being judicial in its character. There is in this position a misapprehension of the purport of the act. By submitting the matter to the secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact. *Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable rivers between the States or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may, in direct terms, declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction;* and, in the latter case makes its declaration take effect when those conditions are complied with. The act in question requiring the approval of the secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular in-

formation. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act, as a declaration of legislative will, must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate.

S. C. v. *Geo.*, 93 U. S. 13."

Says *Mr. Cooley*, in his work on

Constitutional Limitations, pages 722, 723, and 732,

"It is not doubted that Congress has the power to go beyond the general regulations of commerce, which it is accustomed to establish, and to descend to the most minute directions, if it should be deemed advisable."

Briefly speaking, this power of Congress is of two kinds:

(First) Where the regulations governing commerce are national in their character and uniform in their operation, it is exclusive.

(Second) Where the regulations to be prescribed are local and limited in their nature, the States can legislate *until* Congress acts.

Said the Court, speaking through Mr. Justice Field, in the case of

The Gloucester Ferry Co. v. *Penn.*, 114 U. S. 215,

which was an action brought by the State of Pennsylvania to collect a tax upon the capital stock of the ferry company, an interstate concern,

> "While with reference to some of them which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them, yet, where they are national in their character, and require uniformity of regulation, affecting alike all the States, the power of Congress is exclusive."

And just prior to this quotation the learned Justice said:

> "It matters not that the transportation is made in ferry-boats which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose as

> well as the purchase, sale, and exchange of commodities. The power to regulate that commerce as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which shall be governed—that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to, duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety."

This case is further commended to the attention of the Court, for the reasoning of the learned Justice who decided it, in the course of which he illustrates some of the minute particulars to which Congress has descended under the power which the constitution has conferred upon it.

See further the case of

Mobile County v. *Kimball*, 12 Otto, 691,

which was an action brought by a contractor to collect the residue of some bonds issued under an act of the legislature of Alabama for the improvement of Mobile harbor, where the same learned Justice said:

> "The objection that the law of the State, in authorizing the improvement of the harbor of Mobile, trenches upon the commercial power of Congress, assumes an exclusion of State authority from all

subjects in relation to which that power may be exercised, not warranted by the adjudications of this Court, notwithstanding the strong expressions used by some of its Judges. That power is indeed without limitations. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of several States,and to adopt measures to promote its growth and to insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States, which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its nonaction in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose

that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.

"Of the class of subjects local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys, and beacons to guide mariners to the proper channel in which to direct their vessels. * * * *

"The uniformity of commercial regulations which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where, from its nature or sphere of its operation, the subject is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be

taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act, they may be regulated by State authority.

"The improvement of harbors, bays, and navigable rivers within the States falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government. Legislation of the States for the purposes and within the limits mentioned do not infringe upon the commercial power of Congress; and so we hold that the act of the State of Alabama of February 16, 1867, to provide for the 'improvement of the river, bay and harbor of Mobile,' is not invalid."

But, it has been argued, no damage to the streams has been alleged or could be proven; the appellant is only using them.

Our answer is:

(*a*) The act in question makes no distinction in this regard and is not susceptible of any, as far as this case is concerned, in the construction that we claim should be given to it.

(*b*) As we have heretofore stated, it is for Congress, and not the courts, to decide whether and what use of the streams is or is not an injury.

We have seen in the case of the

Gloucester Ferry Company v. *Penn.*, *supra*,

that Congress can regulate a ferryboat which plies on the navigable waters. We shall shortly see that it can regulate the floating of logs on its waters, can prescribe the methods by which those logs can be allowed to float, and by what class of persons they shall be cared for while floating; and we respectfully submit, that by the same course of reasoning and with equal propriety, and as completely within its commercial powers, Congress can regulate the "light and flocculent matter," which the appellant company puts into the navigable streams, especially where the government seeks to improve them, for they all equally involve the use of these streams.

The question of the constitutionality of the

River and Harbor Act, approved September 19, 1890, 26 Stat. at Large, p. 264,

as raised in the case of

United States v. *City of Moline*, 82 Fed. Rep. 592.

here a criminal information was prosecuted by the government against the city of Moline, under section 5 of ne River and Harbor Act of September 19, 1890, supra, or maintaining across Rock river, a public navigable aterway over which Congress had assumed jurisdiction y improving it, a bridge which the secretary of war, under the act referred to, had pronounced to be an unreasnable obstruction to navigation, and had notified the unicipal authorities to alter in certain particulars. his the city neglected and refused to do, and moved to nash the information for the reasons, *inter alia*:

> "Second, that the bridge in question was lawfully authorized by the Legislature of Illinois, is the lawful property of the city of Moline, and cannot be taken or injured by the government of the United States without just compensation; third, that the proceedings of the secretary of war giving rise to this information are in pursuance of a statute unconstitutional and therefore void."

So in the case at bar appellant attempts to justify its poion by alleging that the business of hydraulic mining is wful and recognized as such by the laws of the State of lifornia and in many decisions of Court; and further at any proceedings to compel it to observe the Camitti Act, which is analogous to the River and Harbor

Act, supra, are illegal, because that Act creating the Debris Commission and prescribing their powers and duties is unconstitutional if it means what it says. Let us see how the District Judge for the Northern District of Illinois disposes of these contentions:

> "The constitution confers upon Congress the exclusive right to regulate interstate commerce. A waterway like Rock river, emptying into the Mississippi river, though lying wholly within the State of Illinois, is, if navigable, one of the highways of interstate commerce. It leads, with its connections, from points within Illinois to points in other States, and is thus a part of the waterway which, as an entirety, interconnects cities in many States, and carries the commerce of many States. Any obstruction to such a waterway, in the face of a mandate of Congress that the river shall be used as one of its interstate waterways, is open to removal by the proper authority of the United States government.
>
> "*The fact that the State may have authorized the structure is of no avail from the moment that the government of the United States determines to employ the river as such an interstate highway.*
>
> "Has Congress indicated such a purpose? The act of 1888 provides for the location of a canal from the Illinois river, at or near the town of Hennepin, to the Mississippi river, at or near the mouth of Rock river, to be 80 feet wide at the water line, and to have a depth of not less than seven feet of

water, with locks, feeders, etc., and that the secretary of war shall cause to be made and submitted to Congress detailed plans and estimates for such construction. In pursuance of this act the canal was, by the secretary of war, duly located, and detailed plans and estimates for its construction submitted, which plans and estimates included the use of Rock river, averred by the information to be navigable, from a point five or six miles below the bridge in question to a point five or six miles above. Following this action of the war department, the Congress of 1889-90 passed an act authorizing the secretary of war to construct the canal upon the plans and specifications submitted, with power to make certain alterations in respect of the locks and feeders, and with the necessary powers of eminent domain. Following this, the Congress of 1891-92 made appropriations for the construction of such canal, and the acquirement of right of way; and every Congress since has continued such appropriations. These acts clearly indicate a defined purpose upon the part of Congress, as far back, at least, as 1889 or 1890, to use Rock river for a distance of several miles above and below the bridge in question as a part of the proposed waterway. As a navigable waterway of the United States, Congress had at any time the right to enter upon its improvement; and the plans adopted by Congress in effect adopt the river, for the distance pointed out, as a part of the proposed waterway. The acts of Congress, read in connec-

tion with the plans and specifications of the war department upon which the acts proceed, look to a navigable waterway from the Illinois river to the Mississippi, and utilize towards that end so much of the Rock river—a stream admittedly navigable—as seems best adapted to that purpose. The improvement, therefore, is, in effect, an improvement in the navigability of the river. The effect of all these acts is that Congress has taken into its jurisdiction, as one of the navigable waters of the United States, that portion of Rock river where this bridge is located, intending thereby to make it a part of the proposed waterway from the Illinois river to the Mississippi river. From the moment of such a declaration, the power of Congress over the portion of the river designated is supreme. *Any obstruction, however, authorized by the State law, must yield to this superior authority.* * * *

"But it is contended that the proceedings of the secretary of war under the fourth section of the act of September 19, 1890, are invalid, because such section is unconstitutional. The section provides that, whenever the secretary of war shall have good reason to believe that any bridge now constructed over any navigable waterway of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, it shall be his duty, first giving the parties reasonable opportunity to be heard, to give notice to the person owning or controlling such bridge so to

alter the same as to render navigation under it free, easy, and unobstructed, and in giving such notice to specify the changes required to be made, and prescribe a reasonable time in which to make them. If, at the end of such time, the alteration has not been made, the district attorney for the proper district is empowered to bring the criminal proceeding here instituted. * * *

"Now, if Congress can constitutionally authorize any of its executive officers to deal with a case like this, whereby the obstructions may be removed, and the water way opened up, without having first passed an act specifically applicable to the given obstruction, these proceedings ought to be maintained. It will be observed that the power claimed in this instance is not to either authorize the building of a bridge, or ordering its construction, thereby drawing with it the decision of what streams Congress either takes or surrenders jurisdiction over. The power claimed is, in effect, an incident only to the execution of the larger purpose of Congress respecting Rock river, and administrative of that purpose. It is one of the essential administrative acts towards carrying out the special acts of Congress, to the effect that through this river, at this point, there shall be a waterway having capacity for vessels of at least 280 tons burden. The bridge, during the time of its present construction, is an effectual obstruction to such waterway. *If Congress can, by special act, constitutionally endow the arm of the secretary of war with power to remove*

everything that lies in or across that river obstructive of the proposed waterway, why may it not grant such power, with equal efficacy, by a general act applying to all cases as they arise? Whether the act conferring the power be special or general, the war department becomes simply the arm that carries out the legislative will. *It is true that this involves decision of the department, but the department can in no instance be effective and at the same time an insensate and unjudging executive instrument.* In administrative undertakings of this character the directions cannot be so completely foredrawn by Congress that there will be left no questions to the administrative mind to decide. *The test of the legality of the delegation of power is, not that the administrator must himself decide questions as they arise, but, are the questions thus presented essentially judicial?*

*"In this case, two questions alone arise: First.—Is the bridge an obstruction to navigation? * * * The first question is purely administrative, and is one that Congress can certainly delegate to the secretary of war.* A thousand questions of equal moment to the parties interested, and of equal difficulty, are necessarily delegated to the great departments of the government every month. In the very nature of things, Congress cannot dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately. * * * * I hold, therefore, that the act, so far as it is applicable to the case in hand, is constitutional and valid, and the motion to quash will be overruled."

So in the case at bar Congress has unequivocally declared that it has assumed complete jurisdiction over the streams used by appellant by passing the River and Harbor Appropriation Acts of 1890, 1894 and 1896, *supra*.

At page 451 of the first of these acts is found an appropriation of $30,000 for the improvement of the Sacramento and Feather rivers. At pages 453-455 are found provisions forbidding the throwing of a great many enumerated kinds of refuse into the navigable waters of the United States, and prescribing a punishment of fine or imprisonment for so doing; and power is given to the secretary of war to absolutely determine what contemplated improvements or structures in or over these waters are or are not obstructions to said waters. The second act also carried appropriations (p. 358) for the continued improvement of the Sacramento, Feather, and Yuba rivers; and in the act of June 3, 1896, at page 232, Congress has continued to assume control over these streams by providing that a board of engineers should survey them, and report upon a feasible plan for their further improvement.

In the case of

Newport and Cincinnati Bridge Co. v. *United States*, 15 Otto, 470

the facts, in brief, were that the bridge company, under authority from the legislatures of the States of Kentucky and Ohio, and with the assent of Congress, commenced to build a bridge across the Ohio river. Subsequently, and

before its completion. Congress passed an act providing for changes in the plans and structure of the bridge, and providing further, that if the company was damaged by this act, compelling it to make these alterations, it could recover therefor against the United States, in the Circuit Court of the United States for the Southern District of Ohio. The changes were made as directed by the statute; and in pursuance thereof suit was brought in the proper Circuit Court, which dismissed the bill. The bridge company appealed, and Chief Justice Waite delivered the opinion of the Supreme Court, saying in part:

> "But the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme, and overrides all that the States may do. *When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful.* Those who act on State authority alone necessarily assume all the risks of legitimate congressional interference. In the present case, both the Ohio and Kentucky divisional companies were, by express provisions in their respective charters, subjected to this paramount controlling power. The consolidated company was, therefore, prohibited from obstructing navigation more than the laws of the United States authorized, and was required to build its bridge in accordance with

the provisions of the act of 1862, or any other law that Congress might thereafter pass on the subject. Hence the joint resolution of 1869 became, by the operation of both congressional and State enactments, the law on which the rights of the company depend. It was the paramount license for the erection and maintenance of the bridge; and the company, by accepting its provisions, became subject to all the limitations and reservations of power which Congress saw fit to impose.

"*From this we conclude that the withdrawal by Congress of its assent to the maintenance of the bridge when properly made, is for all the purposes of this case, equivalent to a positive enactment that from the time of such withdrawal the further maintenance of the bridge shall be unlawful, notwithstanding the legislation of the several States upon the subject.* If modifications are directed, assent is, in legal effect, withdrawn, unless the required changes are made.

"*It is contended, however, that under the terms of the reservation, the assent of Congress could not be withdrawn until it had been in some way judicially ascertained that the bridge, as authorized, either did, in fact, or would, if built, substantially and materially obstruct free navigation. Such, we think, is not the fair meaning of the language employed.* In the case of the

Wheeling Bridge, 13 Howard, 519,

it was judicially settled in this court that a bridge as constructed did illegally interfere with navigation; but, when afterwards Congress, in the exercise of its constitutional authority to regulate com-

merce, legalized the structure by legislative enactment, the Court held in

Wheeling Bridge, 18 How. 421 (59 U. S. 435) that this act of legislative power removed the objection to the further continuance of the bridge, because, in the opinion of the legislative department of the government, the obstruction which had been erected was no more than those interested in navigation should submit to for the general good. It is to be observed that the question now under consideration is not whether the bridge company has failed to comply with the requirements of the joint resolution, *but whether those requirements are all that the due protection of free navigation demands. The first is, undoubtedly, a proper subject for judicial inquiry, but the last, as we think, belongs to the legislature. Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and interstate commerce.* Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt shall be resolved in favor of the government. As Congress can exercise legislative power only, all its reservations of power connected with grants that are made must necessarily be legislative in their character. In the present case the reservation is of power to withdraw the assent which was given

and to direct the necessary modifications and alterations. This was to be done in case the free navigation of the river should at any time be substantially and materially obstructed under the authority which was granted. It was originally a proper subject of legislative inquiry whether the joint resolution made sufficient provision for the protection of commerce. There is nothing to indicate that any different inquiry was to be instituted to determine whether the assent that had been given should be withdrawn, and as the withdrawal involved an act legislative in its character, the necessary presumption is that the necessary inquiry on which it was so predicated would be legislative also. *No provision is made for instituting proceedings to have the question determined judicially; and even if the courts should determine that the bridge did substantially and materially obstruct navigation, Congress could not be compelled to withdraw its assent to the further continuance of the structure* This is evident from the Wheeling Bridge case (*supra*), where, as has been seen, congressional assent to a substantial obstruction was recognized as sufficient to prevent the execution of a decree of this Court requiring the abatement of what, but for this assent, would have been, in the judgment of the Court, a public nuisance. *The withdrawal of assent, therefore, has been left to depend on the judgment of Congress in the exercise of its legislative discretion. For this purpose Congress must make its own inquiries and determine for itself whether the obstruction that has been authorized is so material and so substantial as to justify, under all the circumstances of the case, an exercise of the*

power which was reserved as a condition of the original grant made."

Mr. Justice Field, in his dissenting opinion, sums up the decision of a majority of the Court in the following language:

> *"This Court, thus in effect, decides that the power of Congress over all structures crossing the navigable streams is absolute; and that it can change or remove them at its pleasure without regard to their effect upon the free navigation of the streams and without compensation to the owners."*

The case of

> *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard, 421,

involved a bridge which the Court had declared to be an obstruction and which Congress had a few months thereafter legalized, the Court saying:

> "The regulation of commerce includes intercourse and navigation, *and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction of navigation;* and that power, as we have seen, has been exercised consistent with the continuance of the bridge"; and, further, "now whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If in the meantime, since the decree, this right has been modified by the compe-

tent authority so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the Court cannot be enforced."

See further,

The Daniel Ball v. *The United States, supra.*
Cardwell v. *American River Bridge Co., supra.*
Willamette Iron Bridge Co. v. *Hatch,* 125 U. S. 1.

In the case of

The United States v. *Rum River etc. Boom Co.,* 3 Fed. Rep. 548,

the Court restrained the running of logs over the falls of St. Anthony, where damage was threatened to the government improvements there; and in the cases of

Craig v. *Kline,* 65 Pa. St. 399; 3 Am. Rep. 636, and
Harrigan v. *Connecticut River Lumber Co.,* 129 Mass. 580; 37 Am. Rep. 387,

the Courts held that State statutes prescribing conditions under which the Susquehanna, Lehigh, and Connecticut rivers could be used in the floating of logs, were constitutional, Agnew, J., saying in the former:

"It is a difficult problem now to define the boundaries of State and Federal powers. The doctrine of the rights of States pushed to excess culminated in Civil War. The rebound caused by the success of the federal arms threatens a consolidation equally serious. In this condition the landmarks of the constitution, as planted by Chief Justice Marshall and his associates on the solid ground of

reason and a due regard to the rights of the States and of the Union, constitute the only safe guides of decision. The power of Pennsylvania to legislate upon the navigation of the river Susquehanna, which is the question in this case,involves a federal power exceedingly intimate in its relations to the subjects of State sovereignty. The power to 'regulate commerce with foreign nations and among the States, and with the Indian tribes, cannot stop,' (says Marshall, C. J.) 'at the external boundary line of each State, but may be introduced into the interior. It comprehends navigation within the limits of every State in the Union, so far as that navigation may be in any manner connected with commerce, either foreign or interstate, and may therefore pass the jurisdictional lines of the States, and act upon the very waters to which State legislation applies.'

Gibbons v. *Ogden*, 9 Wheat. 1.

"But while thus asserting the great extent of the federal power, the opinion concedes to the State an 'immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are competent parts of this mass.' These, and others not enumerated, constitute police powers,

such as are exercised in the passage of laws to promote the peace, safety, good order, health, and the interests of the State, and are protected by the 9th and 10th Articles of the Amendments to the Constitution of the United States. 'The powers reserved to the States' (says the 45th number of the Federalist) 'will extend to all the objects which in the ordinary course of affairs concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the State.' Or, as said by McLean, J., 'all powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the States and the people.'

New Orleans v. *United States*, 10 Pet. 737.
And see *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Id. 245.
License Cases, 5 How. 582, 583, 592.

"But though this large field of State power is conceded, a difficulty arises sometimes in relation to its subjects, when they become the objects of the exercise of the federal power also. Thus says Mr. Story, in his work on the Constitution: 'A State may use the same means to effectuate an acknowledged power in itself which Congress may apply for another purpose. Congress itself may make that a regulation of commerce which a State may employ as a guard for its internal policy, or to preserve the public health or peace, or to promote its peculiar interests.' An illustration will be found in the case of

Wilson v. *Blackbird Creek Marsh Co.*, 2 Pet. 245,

in which the authority of a law of Delaware was questioned. The plea stated the creek to be a navigable highway, in which tide ebbed and flowed, and the argument insisted that the law of the State conflicted with the power to regulate commerce. But its validity was sustained, on the ground that the erection of the dam was necessary for the benefit of the citizens of Delaware, and not opposed to any law of Congress, none having been passed to regulate such streams; and in the expressive language of Chief Justice Marshall, it was not repugnant to the power to regulate commerce in its dormant state. This distinction in regard to the exercise of the power by Congress, is important as coming from the distinguished author of the opinion in *Gibbons* v. *Ogden*, sometimes quoted to carry the power of Congress further than it was intended by him to advance it—to the extent, indeed, of holding that a State cannot exercise its power over a subject within the power to regulate commerce, whether Congress has legislated on the same subject or not. This opinion is not sustained by the case cited from 2 Peters, or later authorities, and is strongly combated by Chief Justice Taney in

The License Cases, 5 How. 578, *et seq.*,

who refers to that case and others to show that it was not the opinion of Chief Justice Marshall that the mere grant of a power to the general government is to be construed as an absolute prohibition to the exercise of any State power over the subject of it. The question may be considered as now set-

tled in conformity to the opinion of Chief Justice Taney, by the case of

Cooley v. *The Board of Wardens of Philadelphia*, 12 How. 318,

which holds the grant of the power to regulate commerce is not exclusive, but that the question in each case depends on the character of the subject, some requiring it to be treated as exclusive and others not so. Opinion of Curtis, J.

But, without standing on what some may regard as debatable ground, it seems to be clear that when a State exercises her own sovereign power in a matter involving the interests of her citizens, though it may touch upon a subject within the field of the power to regulate commerce, it is not for that reason invalid if it conflicts with no law Congress has passed upon the same subject. Thus, pilot laws, though regarded as directly affecting a subject of commerce have been held to be valid."

Cooley v. *Board of Wardens*, 12 How. 299;
Pacific Steamship Co. v. *Joliffe*, 2 Wall. (U. S.) 450.

In the case of

Texarkana and Fort S. Ry. Co v. *Parsons*, 74 Fed. Rep. 408,

a railroad bridge crossing Red river was held to be an obstruction, merely because the plans thereof were not submitted to the secretary of war, in accordance with the statute, and it had not been constructed precisely in accordance with the explicit requirements of Congress. The Court's at-

tention is also called to the opinion of the attorney general, rendered in the very case under consideration, which is as follows:

"Department of Justice,

"Washington, D. C., Sept. 24, 1894.

"*The Secretary of War* --Sir: I have the honor to acknowledge the receipt of the letter of the acting secretary of war inquiring whether or not the North Bloomfield Gravel Mining Company, of California, falls within the jurisdiction of the California Debris Commission, under the act of Congress, approved March 1, 1893, and entitled 'An act to create the California Debris Commission, and regulate hydraulic mining in the State of California'; and inquiring also, whether, in view of the fact that the said mining company has never made application to the said commission for license to operate, as required by the terms of said act, the commission has 'authority to enter upon the premises for the purpose of inspecting or supervising the operation of the mine, or performing any of the duties devolved by the said act upon the commission in respect thereto; and if it has that authority, and is forbidden by the said company to enter upon its premises for that purpose, by what means can the commission enforce its said authority?

"In reply I beg leave to state that in my opinion there is no reason why the company mentioned should not come equally with any other company or individual engaged in hydraulic mining within

the jurisdiction and under the authority of the commission. The claim of the company, that under the decision of the Circuit Court of the United States for the Northern District of California, in the case of the United States v. the same company (53 Fed. Rep. 625, dated October 5, 1892), the defendant was removed beyond the provision and operation of the law creating the commission, I deem utterly untenable. At the time of the trial and decision of the case mentioned, that law was not in existence, consequently it could not have been construed or the extent of its operation defined by the Court. Moreover, the decision referred to was only to the effect that an injunction to restrain hydraulic mining by the defendant should be denied for the reason that there was not sufficient showing of damage to the navigability of public waters. But, whatever might have been the status of that company prior to the enactment of the debris law, that law has become operative upon it as well as upon all others conducting the business of hydraulic mining; and this company, if engaged in such hydraulic mining, and without license, is doing so in violation of law, for it is provided by section nine (9) of said act (27 Stat. p. 508): 'That the individual proprietor, or proprietors, or in the case of a corporation, its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section 3 hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition setting forth such facts as

will comply with law and the rules prescribed by said commission.'

"The right of the commission to enter upon the lands of the company where such mining is being, or is supposed to be, unlawfully conducted, seems entirely clear, under the provisions of section 5 of said act. This section, after directing that the commission shall make examinations and surveys to determine the practicability, utility, etc., of the storage sites for debris, reservoirs, etc., to aid in the improvement and protection of the rivers within its jurisdiction, and to that end, preventing, amongst other matters, deposits of debris, resulting from mining operations declares that the commission shall * * * 'investigate such hydraulic and other mines as now are, or may have been, worked by methods intended to restrain the debris and material moved in operating such mines, by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as sound experience and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid.'

"By section 10 of said act it is provided 'That said commission, or a committee therefrom, or officer of said corps assigned to duty under its orders, shall, whenever deemed necessary, visit said territory and all mines operated under the provisions of this act.' * * * By section 22 of this act, hydraulic mining contrary to the provisions of the

act, to the injury, direct or indirect, of navigable waters, is made a misdemeanor, punished by fine and imprisonment; while by section 5 the power to investigate mines is given in relation to those that 'are now or may have been' worked. I think that the law intended thus to give to the commission ample means for ascertaining the method of conduct of the mining industry, with a view to the protection of the navigable waters concerned, and the punishment of violators of the law, and that such means necessarily include the right to enter upon and inspect premises even at the present time.

"I am unable to find in the act in question any provision for the enforcement of the right of the commission to enter upon lands for the examination of mines; and in the absence of such express provision, am of the opinion that the preferable course would be the filing of a bill in equity, alleging (amongst other and usual matters) that the company is conducting hydraulic mining, without license and without application for license, and, as believed, to the injury of navigation of the streams; that the commission desire to investigate concerning the method of mining, construction of reservoirs, etc., and to that end have attempted to enter upon the land, but have been denied admittance; the prayer of the bill to be for an injunction to prevent the defendants from preventing the entry of the commission, and for injunction restraining the defendants from mining during the

time the commission is excluded from it, and pending the investigation.

"Respectfully,

"RICHARD OLNEY,

"Attorney General."

We believe the reasoning of the Court in the cases which we have quoted and cited amply sustains the foregoing opinion of the attorney general, and establishes our contention that Congress had constitutional authority to pass the act in question, and to prohibit to certain industries, except under certain conditions, even *the use* of the navigable waters of the United States, especially where such use does eventually tend to work injury to them. Mining cannot be carried on by the hydraulic process in the territory drained by the Sacramento or San Joaquin river systems without the ultimate use of either of these rivers and some of their navigable tributary streams, for a territory drained by a stream, in the sense of this statute, has such stream as the outlet for its waters, such as are employed in hydraulic mining; and Congress has, in effect, declared that such use is an injury to them, except it be exercised under certain conditions. The question of any present ostensible injury susceptible of proof to a Court's satisfaction, as distinguished from the use of the navigable waters, cuts no figure in the construction of the act, in our belief, except in its criminal features. By the passage of the Caminetti Act, Congress has virtually declared that the hydraulic mining carried on by the

North Bloomfield Company is injurious and creates an obstruction to the streams so used, except when certain limitations and conditions are observed. Appellant's counsel admits (Brief, p. 27),

> "That Congress can control commerce and navigation on the navigable portions of the Sacramento river and its tributaries * * * Congress also has power to prevent the obstruction of navigable streams, or interference with interstate or foreign commerce."

See further Sang Lung & Co v Jackson, C decision by De Haven J. February 21- 1898

Therefore, as we have seen that Congress has the power to determine this fact, either by itself or its duly authorized officers or agents, it necessarily follows that no objection to the constitutionality of the act can have any force. A decision in favor of our contention upon this branch of the case clears the way for an ultimate decision in appellee's favor.

IV.

The Act in Question is Mandatory and not Merely Permissive.

Failing, as it must, in showing that there are any constitutional objections to the act under consideration, appellant next seeks to take away all of its life and force by contending for a construction of section 9 that would, if

established, make the law of no value whatever for accomplishing the objects that Congress had in view in passing it. Counsel would have the Court believe that the act was passed, not by way of a compromise between the conflicting farming and mining interests, which the history of the times tells us was the motive for its enactment, but was intended to act wholly in the latter's behalf. He says the hydraulic miner has the option whether or not to comply with sections 9 and 10 of the Act; in other words, that the term "must" in the former section should be construed as if "may" had been employed.

It is a familiar rule of statutory construction that *when a power for public purposes is conferred, a duty arises to execute that power.* As was said in the early case of

Rex and Regina v. *Barlow*, 2 Salk. 609,

> "Where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall'; thus, 23 Hen. VI says the Sheriff *may* take bail; this is construed he *shall*, for he is compellable to do so. (Carthew, 293.)"

In other words, where a duty is enjoined or a public right is given or involved, the word "may" is frequently construed to mean "must" or "shall"; otherwise the right would be defeated. But, as the Supreme Court of the United States said, in the case of

Minor et al. v. *The Mechanics' Bank of Alexandria*, 1 Peters, 47:

"The argument of the defendants is that 'may' in this section means 'must'; and reliance is placed upon a well-known rule in the construction of public statutes where the word 'may' is often construed as imperative. Without question, such a construction is proper in all cases where the Legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject further than that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the Legislature in the enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions."

See, further,

Mason et al. v. *Fearson*, 9 How. 247.

Adriance v. *Supervisors etc.*, 12 How. Pr. 224.

Newburgh Turnpike Co. v. *Miller*, 5 Johns. Ch. 101.

Hagadorn v. *Raux*, 72 N. Y. 583.

But the converse of the rule we have stated, i. e., that "must" is here equivalent to "may," and is directory or permissive only, not mandatory, is not true, and finds no support in any adjudged cases. To say that a thing *may* be done is to say that it may not be done at all, and hence there is little use of saying anything about it except in these cases where privileges are conferred. The Act before the Court imposes a duty upon the miner of a hydraul-

ic mine. He *must* comply with its provisions. He *must* file a petition. To say that he *may* do these things is to defeat the purpose of the act. To say that a hydraulic miner *may* mine without complying with its provisions is to make it a nullity. He *must* either file his application and obtain a permit or cease mining.

The authorities cited by appellant do not sustain his contention, and we believe that no case can be found holding that where rights are involved, as in the present instance, "must" is to be construed as "may." Such a construction would nullify the act.

We have examined all except one of the cases cited by the learned counsel for appellant to sustain his contention that the word "must" in section 9 of the act should be here construed as "may," and none of them bear out his theory. In the case of

Spears v. *The Mayor etc.*, 72 N. Y. 442,

the Court considered that the section of the law there under examination containing the term "must" was simply, and only intended as, a codification of a former law, giving the Court discretion in allowing a litigant to file a supplemental pleading, and therefore should be so construed, although the word "may" had been changed to "must."

In the case of

Wallace v. *Feely*, 61 How. Pr. 225, affirmed without opinion in 88 N. Y. 646,

the Court of Common Pleas of New York City considered the term "must" was more imperative than "shall"; and

in holding that as a former statute in *pari materia* had been considered merely directory by former decisions, in order to follow its former rulings upon the old law, the substitution of "must" for "shall" in that instance was unimportant, said:

> "As verbal alterations occur frequently in the new code without apparent reason, the change in question loses much of its significance."

In

Merrill v. *Shaw*, 5 Minn. 113,

the Court held that "must" should not be considered to be an absolute and inflexible mandate upon the Court" because the context there showed plainly that it was not intended to be so interpreted.

The case of

Fowler v. *Perkins*, 77 Ill. 271,

offers no consolation to appellant, and in

Wheeler v. *Chicago*, 24 Ill. 105,

the Court said:

> "The word 'shall' may be held to be merely directory, where no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual by giving it that construction; *but if any right to any one depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit.* But where no right or benefit to anyone depends upon the imperative use of the word it may be held to be directory merely."

Th right of the United States, in the case at bar, depends upon giving the word "must" in section 9 of the Caminetti Act an imperative construction.

The case of

R. R. Co. v. *Hecht*, 95 U. S. 168–170,

involved the interpretation of the term "shall" in a State statute prescribing a method of service of summons upon a corporation, where subsequent legislation provided other means of such service. The Supreme Court held that, in view of such subsequent legislation upon the same subject and because of the rule of law that "as to remedies, * * *legislative power of change may be exercised when it does not affect injuriously rights which have been secured," the term "shall" in the old law should be considered as reading "may," in order to give the subsequent act force and effect.

Is it not more rational to hold that the Saxon word "must" is ordinarily used in the statute to place beyond doubt or cavil what is intended? It is more imperative than "shall," and has not yet been twisted like the words "may" and "shall" into meaning something else.

Eaton v. *Alger*, 57 Barb. (N. Y.) 179–190.

Webster defines the "must" thus:

"1. To be obliged; to be necessitated; expressing either physical or moral necessity; as a man

must eat for nourishment; we *must* submit to the laws. 2. To be morally required; to be necessary or essential to a certain quality, character, end, or result; as he *must* reconsider the matter; he *must* have been insane."

V.

The Question of Damage to the Navigable Streams, Under the Act in Question, is not for the Courts to Determine.

Appellant next contends that unless damage to the navigable streams can be judicially proven, a Court of equity cannot enjoin the Company from using them. It says, in effect: Prove that the navigable waters are being damaged by us before you are entitled to an injunction restraining us from using them! Manifestly, if it were shown that a hundred hydraulic mines were each pouring "flocculent matter" into a stream, it would be well nigh impossible to single out any of them as appreciably damaging it. We contend the use of the stream in the manner admitted by the answer, is of itself an injury in the eye of the law, whether it perceptibly or imperceptibly damages it. Appellant qualifies its denial of damage by admitting use. This, we contend, is an admission of injury; and counsel for appellant forgets that the Supreme Court of the United States has said in

South Carolina v. *Georgia*, *supra*,

that for the purpose of regulating commerce the navigable streams are the public property of the nation. Anything

that affects the streams affects commerce upon them and the Government's right of property in them. Even if an act be a criminal offense, still if it invades property rights, the act may be enjoined.

Many of the authorities cited by appellant's counsel upon this branch of the case are found in High on Injunctions, and in the last edition are found some which they did not cite, bearing on their contention.

But Mr. High, in citing these cases states the rule correctly, and says:

> "The subject matter of the jurisdiction of equity being the protection of private property and of civil rights, Courts of equity will not interpose for the punishment or prevention of merely criminal or immoral acts unconnected with violations of private rights. Equity has no jurisdiction to restrain the commission of crimes, or to enforce moral obligations, and the performance of moral duties, nor will it interfere for the prevention of an illegal act merely because it is illegal, and in the absence of any injury to property rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral and illegal acts."
>
> *High on Injunctions*, 3 Ed., p. 19, Sec. 20.

But it must be evident that the authorities cited by the counsel for defendant have no application to the case before the Court. It is not sought to restrain an im-

moral act or an offense, merely, but an act injurious to the rights of the appellee, and which appellant has no moral or legal right to exercise.

Mr. Pomeroy states the rule:

> "In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any question, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows: Whenever a right exists or is created by contract, by the ownership of property, or otherwise, cognizable by law, *a violation of that right will be prohibited,* unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.* The jurisdiction of equity to prevent the commission of wrongs, however, is modified and restricted by considerations of expediency and of convenience which confine its application to those cases in which the legal remedy is not full and adequate. Equity will not in-

terfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction."

3 Pomeroy's Eq. Jur., Sec. 1338.

Here, of course, damages would not be an adequate remedy, and as appellee's rights are violated, it is entitled to an injunction. This principle is illustrated in many cases.

Riparian proprietors of a private stream are entitled to use and enjoy the stream without diminution or alteration, and will be protected by injunction from violation of their right.

Brown v. *Ashley*, 16 Nev. 344.
Society v. *Lone*, 2 C. E. Green, 19.
How v. *Norman*, 13 R. I. 488.
Bitting's Appeal, 105 Pa. St. 517.
Heilbron v. *Canal Co.*, 75 Cal. 426.

A riparian proprietor is entitled to an injunction to restrain the unlawful diversion of the waters of a stream adjoining his land, although the injury caused by the diversion is incapable of ascertainment or of being estimated in damages.

Heilbron v. *Canal Co., supra.*

A party claiming a certain quantity of the waters of the stream adversely to the riparian proprietor, under an unlawful appropriation thereof, cannot justify his diversion by showing that there was no appreciable difference in the quantity of the water flowing in the stream at a time when he took the water and at a time when he did not.

Heilbron v. *Canal Co.*, *supra.*
See also *Lux* v. *Haggin*, 69 Cal. 255.

The owner of lands through which flows a non-navigable stream may restrain a person from floating logs down the stream, which results in a continuous trespass on plaintiff's premises.

Haines v. *Hall*, 17 Or. 165.

In actions for the diversion of water, when there is a clear violation of an established right, and a threatened continuance of such violation, it is not necessary to show actual damages or a present use of the water, in order to authorize a Court to issue an injunction and make it perpetual.

Brown v. *Ashley*, 16 Nev. 311.

In *Corning* v. *Troy I. & N. F.*, 40 N. Y. 206, the court said:

> "No man is justified in withholding property from the owner when required to surrender it, on the ground that he does not need its use. The

plaintiffs may do what they will with their own. Upon established principles this is a proper case for equity jurisdiction. First, upon the ground that the remedy at law is inadequate. The plaintiffs are entitled to the flow of the stream in its natural channel. Legal remedies cannot restore it to them and secure them in the enjoyment of it. Hence, the duty of a Court of equity to interpose for the acomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid, the only remedy of the plaintiffs, whose rights have been established, will be to commence suits from day to day, and thus endeavor to make it for the interest of the defendant to do justice by restoring the stream to its channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of the plaintiffs to equitable relief sought is established by authority as well as principle."

A Court of equity has power to restrain by injunction the disturbance of a right held by a landowner to have an artificial watercourse flow into his land from a neighbor's land.

Bitting's Appeal, Supra.

An unreasonable use or detention of water by defendant operating a saw-mill upon a stream affords sufficient

ground for an injunction as a violation of plaintiff's easement in the stream.

Pollitt v. *Long*, 58 Barb. 20.

Equity will protect the enjoyment of a right of way over a street, alley, or road by restraining the erection of obstructions thereon.

Nicholls v. *Wentworth*, 100 N. Y. 455.
Roman v. *Strauss*, 10 Md. 89.
Gorton v. *Tiffany*, 14 R. I. 95.
Devore v. *Ellis*, 62 Tex. 505.

"The violation of franchises or special privileges conferred by legislative authority, either upon individuals or upon corporations, affords frequent occasion for invoking the extraordinary aid of equity by way of injunction to remedy evils which the usual modes of redress in courts of law are powerless to mitigate or to prevent. The value of a franchise being generally dependent upon its exclusive use and possession, it may be protected upon the ground of the inadequacy of the legal remedy and the probability of thus avoiding a multiplicity of suits."

2 *High on Injunctions*, 3d ed., sec. 897.

A water company that has the exclusive right or franchise of supplying water in a place may enjoin a rival company from interfering with such right.

Williamsport W. Co. v. *Lycoming G. & W. Co.* 95 Pa. St. 35.

An exclusive right of fishing in a river may be protected by injunction.

Ashworth v. *Crowne*, 10 Ir. Ch. 421.

"Frequent instances of the interference of equity to prevent the violation of a franchise occur in the case of roads, as where the exclusive right to control and operate a highway turnpike, or other road, has been granted to individuals or corporations. Thus, where complainant's road is incorporated under an act of Legislature which provides that no other road shall be constructed within thirty years after the passage of the act, the act being held constitutional, is regarded as creating a contract with the corporation and an injunction will be allowed against the operation of a rival road. And although such injuries to a franchise as call for the interposition of equity and the granting of an injunction are generally in the nature of nuisances, and although the jurisdiction of equity over such cases partakes largely of the nature of the jurisdiction in restraint of a nuisance, yet the relief may be granted where the injury to the franchise is purely a trespass, if the remedy at law is inadequate. And the destruction of toll-gates and preventing the collection of tolls, although a trespass, is such a one as cannot be adequately compensated in damages in an action at law, and it will therefore be enjoined in equity."

2 *High on Injunctions*, 3d ed., sec. 912.

Equity will prevent interference with the right to maintain a bridge and collect toll.

2 *High on Injunctions*, sec. 917.

> "The right to maintain a ferry being a franchise whose value lies in its exclusiveness, equity may enjoin an unauthorized interference with or interruption of such right upon the ground of preventing a multiplicity of suits."
>
> 2 *High on Injunctions*, sec. 926.

The Wisconsin case, extensively quoted by appellant's counsel in his brief,

> *The City of Janesville et al.* v. *Carpenter*, 77 Wis. 288,

is not, we submit, here applicable.

It will be noticed that this was an action in which the city and the Janesville Cotton Mills sought to enjoin the defendant from building upon his own land, which was the bed of a stream to which he had acquired a title in fee *usque ad filum aquae*, in such a manner as not to injure the property or rights, public or private, if any one else. There was no allegation in the complaint of injury but it was complained that the example furnished by the defendant might be followed by others, and thereby certain speculative or problematical damages might ensue to the interests of the city and its inhabitants. The Court said:

> "The action does not involve any question of obstruction or injury to navigation, or of injury to

any public right. Many of the consequences to the city predicted would follow as well the erection of said building outside of the river. The complaint does not show that the proposed building would be a private or a public nuisance. The action is based upon the allegations of anticipated injury to the respective plaintiffs which ought to be prevented by injunction. It is a private and not a public action. * * * In respect to injury to any interest that the city represents, the complaint is very obscure and defective. * * *The only injury to these interests that is alleged is from what somebody else may do in the future through the influence of defendant's example, and that is a mere prediction or conjecture. It is not shown how or in what manner such injury could occur. * * * It is not charged that the proposed building will in itself do any harm in any respect whatever, or that the defendant has not the right to build it where he proposes to build it, but that it may possibly be followed as an example by others in building buildings which may possibly do harm. It would be a new case where one had actually done something in itself right and harmless and he should be sued because others had done something wrong and injurious by following his example, and it would be a strange case to enjoin one from doing something right and harmless in itself, because others may possibly do something wrong and injurious by following his example, and yet the latter is the present case. A mere

example is not actionable. Such is the action in favor of the city."

The Court further remarked:

"The argument of the learned counsel of the respondent, and the authorities cited on the question whether the proposed building will obstruct the navigation of the river, are impertinent to the case. There is nothing in the case that involves any such question in the remotest degree."

It is therefore apparent that this case has no bearing upon the subject matter now pending. The case before the Court involves the unauthorized *use* of certain streams, whose protection and improvement is confided to the general government, and the consequent infliction of a public injury, which may or may not result on the part of this appellant company, in tangible, substantial damage to these streams. It is sufficient, we submit, to refer to the excerpts hereinabove given, to distinguish the case from that at bar.

Nor do the other cases referred to by the learned counsel upon this subject touch the real point at issue here. They undoubtedly state the law, but the trouble lies in their attempted application to the case at bar. There is no question but that a Chancellor will refuse to enjoin the commission or threatened commission of a crime or other unlawful act when not connected with the violation or invasion of a property right. Here, however, a property right is being invaded with irrepara-

ble consequences, and the government's only remedy lies in the granting of this application for equitable interference.

See further the cases referred to on pp 17-51 herein.

VI.

The Hydraulic Mining Interest.

In the Court below, it was said by counsel for the Mining Company that the Court, owing to the vast importance of the hydraulic mining interest, should not interfere to grant the relief prayed for in the complaint. It would be a sufficient answer to say that the government in this case only seeks to compel the company to comply with the express provisions of the statute. But even if there were no statute upon the subject, still whether the mining interest is important or not is an immaterial question. As a matter of fact, it is as nothing compared with the agricultural interest of the State. The mining interest is temporary—the agricultural interest is permanent. The mining interest benefits principally those engaged in the business. Upon the agricultural resources of the State depend the prosperity and perpetuity of the wealth of California. This contention, however, was made in the case of

Woodruff v. *North Bloomfield G. M. Co.*, 9 Sawyer, 441,

and was answered by Judge Sawyer as follows:

"A great deal has been said about the comparative public importance of the mining interests,

and also the great loss and inconvenience to those defendants if their operations should be stopped by injunction. But these are considerations with which we have nothing to do. We are simply to determine whether the plaintiff's rights have been infringed, and, if so, afford him such relief as the law entitles him to receive, whatever the consequences or inconvenience to the wrongdoers or to the general public may be. To similar suggestions, in *Attorney-general* v. *Council of Birmingham* where the sewage of the city, having a population of two hundred and fifty thousand, was the nuisance complained of, the vice-chancellor said: 'Now, with regard to the question of plaintiff's right to an injunction, it appears to me that so far as this Court is concerned, it is a matter of almost absolute indifference whether the decision affects a population of two hundred and fifty thousand, or a single individual carrying on a manufactory for his own benefit. I am not sitting here as a committee of public safety, armed with arbitrary power to prevent what, it is said, will be a great injury, not to Birmingham only, but to all England; that is not my function.'

4 Kay & J., 539.

See also *Stokes* v. *Bandury Board of Health*, 1 R. L. Eq. Cas. 57.

"So in *Attorney General* v. *Colney Hatch Lunatic Asylum*, the Lord Chancellor observes: 'It is said unless the defendants are permitted to throw all their sewage upon their neighbors' lands, upon

which they have no more right to throw it than into this Court, they cannot carry on the Asylum (which contains two thousand two hundred patients); and therefore they contend that they must be permitted to dispose of the whole of the sewage on their neighbors' lands. Surely, the mere statement of the proposition is quite sufficient to refute it. Nobody can suppose the law of England to be in that state. It is not to be supposed that, because we are told, as I was told in the case of *Attorney General* v. *Birmingham*, that three hundred thousand people will be very much inconvenienced if they are not allowed to use their neighbors' property without paying for it, that on that account they are to use their neighbor's property without paying for it. This Court has merely to decide what the law is as it exists, and to see that it is duly administered; not to order anything done that is impossible, as in the illustration I have given, *but to take care, subject to that modification that persons shall be restrained from exercising with a high hand powers which they have no right in law to exercise.*'

4 L. R. C. App. Cas. 155.

"In these cases the acts causing the nuisances were urged as absolutely necessary to the safety of the people interested—to three hundred thousand people, in the case of the city of Birmingham—but the defendants were plainly informed that it was not the duty of the Court to point out how the nuisance should be avoided, but that, however

necessary to the safety or convenience of those interested in the continuance, they must find a way to prevent the nuisance, or cease to perform the acts which occasioned them. Certainly the law is not less favorable to the protection of the rights of every man, under the several express constitutional restrictions before referred to in this country, than it is in England, where there are no such limitations on the legislative power. And authority is not wanting to the same effect in our own reports. In

Weaver v. *Eureka Lake Co.*, 15 Cal. 274,

the Court said: 'It is contended that, under the circumstances, the erection of the dam was justifiable and proper, and that the great value of the lakes as reservoirs is a sufficient justification for the injuries resulting to plaintiff. We are aware of no principle of law upon which such a position can be maintained. A comparison of the value of conflicting rights would be a novel mode of determining their legal superiority.' And in

Wixon v. *The Bear River etc. Co.*, 24 Cal. 373,

the Court, said: 'The four remaining instructions refused by the Court are founded upon the theory that, in the mineral districts of this State, the right of miners and persons owning ditches constructed for mining purposes, are paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition; thus annihilating the doctrine of priority in all cases where the contest is between

a miner or ditch-owner, and one who claims the exercise of any other kind of right, or the ownership of any other kind of interest. To such a doctrine we are unable to subscribe, nor do we think it clothed with a plausibility sufficient to justify us in combating it.' But authority is not necessary on so plain a proposition. Of course, great interests should not be overthrown on trifling or frivolous grounds, as where the maxim, *De minimis non curat lex*, is applicable, but every substantial material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests, that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits, would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public would be arrested in its incipiency.

"But if the comparison could be made in this instance, it would be impossible to say that the interests of the defendants, and of those engaged in the same pursuits, would be more important than those of complainant, and such as he represents in this contest. The direct contrary is maintained by complainant with great force and plaus-

ibility. But we have nothing to do with this question as to the comparative importance of the conflicting interests or the inconvenience to the defendants by the stoppage of their works, if they infringe the material substantial rights of others.

"It is the province and imperative duty of the Court to ascertain and enforce the legal rights of the complainant, no matter what the consequence to defendants may be. This duty no Court could evade if it would."

In the same case, Judge Deady said:

"I am by no means unconcerned or indifferent to the effect of this decision upon the large capital invested in these mines. But it is a fundamental idea of civilized society, and particularly such as is based upon the common law, that no one shall use his property so as to injure the right of an other. *Sic utere tuo ut alienum non laedas.* From this salutary rule no one is exempt—not even the public—and the defendants must submit to it. Without it the weak would be at the mercy of the strong, and might make right."

VII.

Necessity of Determining Sufficiency of Impounding Works.

In every hydraulic mining case that has come before the Courts it has been claimed with the utmost confidence by the hydraulic miners, that their mining opera-

tions produced no injury. The fact was indisputable, however, that injury to the streams was caused by some one, and the miners have not been slow in many instances to fasten this blame upon somebody else. But the Courts investigated the circumstances, and after full examination have determined that hydraulic mining is the source of injury to the navigable rivers of the State of California in the territory in which hydraulic mining is carried on. Even where the injurious effects of hydraulic mining have been conceded the question as to how these injuries might be obviated has always led to wide discussion and difference of opinion. Eminent engineers have differed upon the sufficiency of restraining works. Naturally the hydraulic miner is desirous of expending as little money as possible, and his views as to the sufficiency of his works are always in conflict with those who are opposed to him in interest. It was for the purpose of passing upon the sufficiency of restraining works that, acting as government experts in the matter, the board of engineers provided for by the act of Congress was appointed. It is practically impossible for a Court to pass upon a question involving the sufficiency of dams. Engineers of the widest experience differ on this subject, and where experts disagree, who shall decide?

As illustrating these views, we might call the attention of the Court to the language of Judge Sawyer, in the case of

Woodruff v. *North Bloomfield G. M. Co.*, *supra*, p. 537,

as follows:

"As is usually the case, the views of different engineers and experts distinguished in their profession, differ widely upon the point of practicability and safety. The larger number of witnesses called, and much the larger amount of testimony in this case, so far as mere opinion goes, are, doubtless, in favor of the practicability, *if sufficient means are furnished.* But all the practical experiments heretofore made, at great expense, under the supervision of the State, and of competent engineers, have been lamentable failures. The dams constructed were, doubtless, in many particulars defective. But what guaranty has the Court, and those whose lives and property are at stake, that any future works of the kind will not also be defective? As at present advised, with some knowledge of the tremendous force of Nature, we cannot undertake to say, upon the mere opinion of experts generally at variance, as in this case, however competent, that the scheme would be practicable and safe. We cannot define in advance what works shall be sufficient, and authorize the continuance of the acts complained of upon the peformance of any prescribed conditions. In view of the past experience here and elsewhere with the damming up of waters, and of the wide difference of opinion of competent engineers on the subject, it is clear that *we should not be justi-*

fied in an attempt to prescribe in advance any kind of a dam under which a large community shall be compelled to live, in dread of a perpetual, seriously alarming, and ever present, menace."

Judge Deady, in the same case said:

"Besides, it is a very serious question in my mind whether any person or community can or ought to be required to submit to the continuous peril of living, under or below such a dam as this must necessarily be, if it is made high enough to impound the coarse material; and this, merely for the convenience of another person or persons in the pursuit of his or their private business. It may be likened, at least, to living in the direct pathway of an impending avalanche."

In the later case of

Hardt v. *Liberty Hill Con. M. & W. Co.*, 11 Sawyer, 61,

the Court said:

"In the face of the conflicting views of engineers on the subject, it is impossible to be satisfied of the sufficiency of this dam. The whole matter rests in mere opinion. We have no right to blindly speculate upon matters of such consequence. With our limited faculties, we cannot foresee, with reasonable certainty, what may occur in these mountain rivers, confined in deep canyons, which sometimes become irresistible torrents.

"Nothing short of the attribute and prescience

of omniscence is equal to the task of determining the absolute sufficiency of such a dam, and nothing should be accepted as sufficient, except upon the most indisputable and demonstrative evidence. Where the earth and other material displaced in mining are removed from their bed, and cast into the main rivers in the mountains, they at once become subject to the operation of the tremendous forces of Nature, against which the puny efforts of man can interpose but feeble barriers; at best, can accomplish but little. A small beginning arising from slight causes, originating in accident or design or from the active forces of Nature, may soon develop into a destructive breach in a dam like that in question. Malice may instigate the application of dynamite, and the blowing up of the dam, as was claimed by the owners to be the case—although it is not a known fact—with the English dam some three years ago, and is now claimed with respect to the debris dam in Humbug Canyon. The English dam had been constructed with the highest degree of engineering skill, by parties whose highest interests required that it should be absolutely sufficient and safe under all contingencies; yet, through accident, malice, the forces of Nature, or some other cause unknown, it gave way, and precipitated its destructive flood of water, in ten hours, upon the plains eighty-five miles distant below, breaking in several places, where the water channel was more than a mile wide, levees that had withstood the

ordinary floods of the rainy season, and doing great damage to the surrounding country.

Debris Case, 9 Sawyer, 484; S. C. Fed. Rep. 766.

"The lamentable failure of the State in building debris restraining dams under the direction of its own engineers, after an expenditure of half a million of dollars, and the equally unsuccessful efforts of private mining companies shown in the

Debris Case, 9 Sawyer, 480; S. C. 18; Fed. Rep. 763, furnish a warning against relying too confidently upon the skill or opinions of engineers, however eminent. The restraining and impounding dams erected by the State, whose interest itwas to make them suffiicient, were in the plains, on comparatively low grades. That of the English dam,doubtless, was in a more difficult position, and was a water dam merely. These were on a larger scale, it is true, and, possibly, some of them in more dangerous positions, than the present one; but, if so, it is only a difference in degree. The same principles of physics and dynamics underlie and control and govern them all. It is not for us, with our limited faculties, to estimate and speculate upon its possibilities, and measure off and lay down a line indicating just how far trespassers may encroach upon the domain of overpowering forces of Nature, within the supposed limits of reasonable possibility or probability, with safety to the rights of the parties below upon whom the trespasses are committed. A Court having power

to enjoin the nuisance might, with just as much propriety, refuse an injunction against the erection by the owner on his own premises of a magazine for the storage of gunpowder and dynamite, adjoining and next to his neighbor's house, upon the evidence of experts in the matter that the magazine is constructed with the most perfect skill, and that it is and will be guarded by all the means for securing safety known to science. Such a magazine might never explode, yet it is liable to explode at any moment. And the same would be true of one of those restraining debris dams, built across one of those main mountain rivers, liable to become roaring torrents. It might not give way for years, yet it is liable to do so at any time during a flood.

"If restraining dams must be relied on by the inhabitants of the valleys of California to protect them from destruction from mining debris, it would seem that such dams should be conconstructed by or under the supervision, and in accordance with the ideas of the parties in danger and liable to be injured, rather that under the supervision and according to the views, of those who commit the trespasses and perform the acts which give rise to the danger and whose interests are not endangered, or in any respect liable to suffer. The party in danger should be the party to determine the measure of his protection—not the party creating the danger for his own benefit.

"It is for the pecuniary interest of hydraulic miners to get out as much of the precious metals as possible, with the least possible expense. The interests of the moving party in this matter are simply to tide over the present, and escape injunctions until its mines can be worked out. What happens afterwards is no concern of his. As human nature is constituted, the action of parties so situated, set in motion by an application of the coercive powers of the law, in the erection at their own expense, and according to their own ideas, of impounding dams for the sole protection of the rights of those upon whom they commit trespass, should be scrutinized with jealous care by those who administer the laws, and whose imperative duty it is to see that each man shall so use his own as not to injure his neighbor. It may well be doubted whether any restraining dam, however constructed, across the channels of the main mountain rivers, of a torrential character, should be accepted by the Courts as a sufficient protection to the occupants of land in the valleys below liable to be injured. But if any are to be accepted, they should only be those the ample sufficiency of which has been established upon testimony of the most unquestionable and satisfactory character. Nothing should be left to conjecture. This is not a matter of a single dam. A rule must be laid down applicable to the entire gold bearing region. It will be no use to restrain one mine, if others are allowed to run. Besides, it would be unjust. All

doing injury must be stopped or restrained from contributing to further injury, or none."

VIII.

Importance of the Case.

We may, perhaps, with propriety, before closing, direct the Court's attention to the importance of the case at bar, which is due to the fact that it involves not only the right of the government to prevent injury to the navigable rivers of the State from the mining operations of the particular corporation before the Court, but it involves also the construction to be given to the act of Congress in relation to hydraulic mining throughout the northern part of California, and a determination whether that act will effectuate the purposes intended.

This is the first case that has arisen in which it has become necessary to construe the various provisions of this act of Congress. The argument of counsel for the appellant, that a vast amount of injury must be shown before it can be enjoined, defeats the very purpose attempted to be accomplished by this act. It requires no such legislation to enable the government of the United States to protect its navigable rivers from great injury. Before the passage of this act suits had been brought by the government of the United States, as well as by the various municipalities of the State of Califor-

nia, and private individuals, to restrain injury to the navigable waters and to the adjacent lands, caused by hydraulic mining. Unless this act confers some new right upon the government, or imposes some new duty upon those engaged in the business of hydraulic mining, it is simply a piece of waste paper. It was intended to impose new duties and obligations upon those engaged in the hydraulic mining process. Before its passage the government was compelled to go into court and to prove that hydraulic mining was carried on to the direct injury of the streams. In the act of Congress it is assumed as a question beyond dispute that hydraulic mining prosecuted in the regions named in the act must necessarily be productive of injury to the navigable waters of the United States. The question of injury Congress has not left open to dispute. It has determined that injury must result from the very nature of hydraulic mining. It recognizes the fact that works must be erected by which this injury may either be prevented or mitigated, and hence appointed a commission of its own engineers to determine this fact. Granted the power of Congress to legislate on the subject, and it follows conclusively that the appellant's position cannot be maintained. The answer admits all the material allegations of the complaint, and admits further that the appellant uses public navigable streams for the purpose of carrying matter from its mine. In other words, it expressly admits in Court by its pleading, that hydraulic mining debris moved in its

mining operations is deposited in the navigable waters of the United States and carried through their length into the bay of San Francisco. It says, in mitigation, that the matter it places in the river is "flocculent matter," and it draws the conclusion, to its own satisfaction, that flocculent matter produces no injury. Therefore, we have before the Court all the elements of injury and misuse which the act of Congress intended to prevent. If the Court should determine that the government is compelled to prove, in order to obtain relief, that this debris matter does injury, in the sense in which appellant uses the word, that is, produces palpable, physical damage, which must be traced to the mining operations of this particular mine, it would follow that the act of Congress is superfluous, because the government under these circumstances could have, and has proceeded, without such act of Congress.

In the cases tried before this Court several years ago, when there was no Congressional statute prohibiting hydraulic mining unconditionally, appellee was not compelled to prove that the particular miners thus sued produced the damage complained of. It was sufficient to show that they contributed in some degree to such damage. It may be that a stream of water would carry without injury the debris from one hydraulic mine, but it would be destroyed if loaded down with debris from a dozen similar mines. Hence, any person contributing in any degree to the in-

jury of the streams must be enjoined, and appellant expressly admits that it contributes at least to the extent of "flocculent matter."

Under the law of Congress it has no right to use the stream at all without permission of the commission.

The question involved in this case is whether the government of the United States can legislate so as to prevent navigable waters of the United States being used at all for hydraulic mining purposes. We claim that the government can absolutely prohibit the use of the streams in any degree for any purpose; for the transportation of flocculent matter, or any matter, and can determine upon what conditions it will allow the streams of the United States to be used, for the transportation of such matter. The navigable waters are to be used for commercial purposes. Their use for any other purpose can only be permissive. They are not intended as sewers to carry away the refuse of cities. They are not intended as conduits to carry away offal from slaughterhouses, or sawdust from sawmills; or coloring matter from dying works; or debris from hydraulic mines. We may concede, in this case, that the government has the power to permit its waters to be used for such purposes, but it has the right to impose the conditions upon which permission shall be granted. It has done so in the act before the Court. The government has said that it will permit hydraulic mining in the territory mentioned on the com-

pliance by the miners with certain conditions, and it will prohibit it when those conditions are not observed.

The act in question is not a harsh one proposed by a hostile interest, and ought not to receive a strict and narrow construction. It is an act that was proposed by the hydraulic miners themselves, who in convention assembled recognized that by the common law of the land they had no right to use the navigable streams of the State for any purpose. They recognized that under the common law, as defined by the Courts, hydraulic mining was absolutely prohibited, not because it was hydraulic mining, but because the conditions necessary for the prosecution of this industry were such that it was necessary to use the streams to carry away the refuse material of the mines. They met in mass convention; they appealed to the farming and agricultural interests, and said that they recognized the binding effect of the decrees of the Courts, and did not seek to avoid them; they thought, however, a plan might be devised whereby permission might be granted to mine with perfect safety to all. They proposed a plan whereby the question of whether they should mine or not should be left to an impartial commission of government engineers. They said, in effect, that they would no longer litigate in expensive trials the question of injury or no injury; they would concede that hydraulic mining must necessarily produce injury except in such cases where the necessary restraining works had been erected to the sat-

isfaction of the government engineers. The proposition they made met with a hearty second. It seemed a fair one, and those that had fought the most bitterly in the past were perfectly willing to submit the question of the use of the streams to a board of impartial government engineers.

The hydraulic miners themselves not only sought the passage of this law, but it seems to us are deeply interested in its maintenance. It is the only safeguard that they can claim to have for mining at all.

If, however, appellant's contention is correct, the Caminetti Act is meaningless and accomplishes nothing. Counsel would have us believe that the act was only designed to legalize the infliction of damage to the navigable streams, not to prevent it by intelligent and scientific methods. According to the appellant company's contention, if it believes it is damaging the streams, it can seek the aid of the commission to avoid the closing of its works by injunction, and the punishment of its officers criminally; but if it believes it is doing no perceptible damage, it can refuse to have the commission determine whether or not its impounding dams are sufficient—in fact, completely disregard that body, because the law, it contends, gives it the option whether or not it will submit to the commission. In other words, it is to be the province of the mining company, not of the Debris Commission, to determine whether or not the navigable streams are being

directly or indirectly injured by the hydraulic mining performed. To give the Caminetti Act such an interpretation, is to take from it all of its life and force, and render it, as we have observed, a meaningless statute. We submit the language of the act shows that this contention is at variance with the intention of Congress, and cannot be sustained.

The act of Congress operates, in effect, as an absolute injunction against all hydraulic mining which uses the navigable waters in the territory named in said act; but permits that injunction to be dissolved by application to the commission of government engineers. To place any other construction upon the act would be to say that the act did not do what it purports to do.

Section 8 specifically refers to the decisions of the Courts, and adopts the definitions made by them. It says that, for the purpose of this act, hydraulic mining, and mining by the hydraulic process, are declared to have the meaning and application given to said terms in said State. Judge Sawyer in the case of *Woodruff* v. *North Bloomfield Mining Co.*, clearly defines hydraulic mining.

There is some mining of this character carried on in the territory described in the act, the debris caused by which does not reach the river channels but is deposited in sloughs, and in some places is deposited upon lands bought and used solely for that particular purpose. It was the design of the act of Congress to reach every mine

where the debris from the mine in any way entered the river system.

Section 3 uses the words "directly or indirectly injuring the navigability of said river systems," showing clearly that Congress not only intended that the act of Congress should apply to such mines as directly placed their debris in the river systems, but also to such mines the debris from which might be liable to be carried into the river systems. There would be no occasion for the use of the word "indirectly" unless this was so. It is a matter of common knowedge that the debris from the hydraulic mines does not all at once enter the rivers, but by being washed into the canyons, it becomes subject to the power of water and gradually is forced into the river channels.

Section 5, in the last sentence, provides for exactly the conditions existing at the North Bloomfield mine. It says that it shall be the duty of the commission to investigate such hydraulic mines as are now or may be worked by methods intended to restrain the debris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise.

If this act of Congress does not take the whole question of hydraulic mining in the watersheds of the Sacramento and San Joaquin rivers, and place it under the jurisdiction of this commission so as to prevent it, where it in anywise affects the navigable rivers in such territory, what purpose does the act accomplish? It is unnecessary

for any man to obtain a permit from anybody to carry on a lawful occupation where he can do no injury.

Whether the injury came from hydraulic mining, or from the turning of the soil by agriculture or from sheep, whether the injury was small or great, whether the injury could be charged to any one hydraulic mine or not, whether or not Congress has authorized the use of the streams for the purpose claimed by the hydraulic miners, whether or not they had acquired easements to use the streams for that purpose, whether or not the magnitude of the industry should entitle them to special protection and consideration—were questions all elaborately argued by the most astute counsel in the State of California. The decisions of the Courts were uniform, and it was recognized by all that unless restraining and impounding works could be erected in every case where, by any possibility, the tailings could reach the streams, the topographical features of California were such, in the river systems mentioned in the act of Congress that hydraulic mining could not, under any circumstances, be prosecuted, and on this theory the act of Congress is framed. It allows hydraulic mining to be prosecuted by the permit of a government commission; it prohibits it in all other cases. The commission is the tribunal to determine, in any given case, so far as the government of the United States is concerned, whether or not the operation of any particular hydraulic mine produces injury to the navigable waters. This commission is a special tribunal, of limited juris-

It is therefore respectfully submitted that the decision of the Circuit Court should be affirmed.

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